AB MALEK ATAN

v.

PP

HIGH COURT MALAYA, KUALA LUMPUR
AUGUSTINE PAUL J
[CRIMINAL APPEAL NO: 42-34-2000]
29 MARCH 2002

CRIMINAL PROCEDURE: *Charge - Framing or particulars of charge - Rape - Penal Code, s 375 - Whether prosecution must state specific limb relied upon - Whether such failure renders charge defective - Criminal Procedure Code, s. 152*

EVIDENCE: *Corroboration - Rape - Credibility - Whether prosecution must prove credibility of complainant's evidence beforehand - Absence of corroboration - Failure to produce material witness and police report - Consent - Accused relying upon defence of consent - Contradictions between testimony of prosecution witness and complainant - Whether failure to resolve contradiction fatal to prosecution's case*

The Sessions Court had found the accused guilty on two charges of rape, both committed against the complainant on two different occasions, and proceeded to sentence him to ten years' imprisonment and eight strokes of rotan for the first charge, and twelve years' imprisonment and ten strokes of rotan for the second charge.

Relying upon the defence of consent, the accused appealed to this court against his conviction and sentence. His first contention was that both charges were defective on the ground that the prosecution did not set out the particular limb of s. 375 of the Penal Code ('the PC') under which the prosecution premised their case. Secondly, the accused contended that an adverse inference ought to be drawn against the prosecution for failing to produce one Jeffry, the person to which the complainant had made a complaint after the second incident. It was also submitted that there were contradictions in the complainant's evidence and the testimony of the prosecution witness, one Azreen, which ought to have tainted the complainant's credibility. The complainant contended that the accused had threatened her in the presence of Azreen and another, one Murad. But Azreen's evidence was that Murad was not present at the material time. The accused argued that he did not threaten her.

Held:

[1] Section 152(2) of the CPC stipulates that where an offence is given a specific name it is only sufficient to describe the offence in the charge by that name only. This is so even if the specific name given may incorporate several circumstances in which the offence may be committed. Conversely, s. 152(3) provides that there is a need to state so much of the definition of the offence as to give the accused notice of the matter with which he is charged if the law which creates the offence does not give it any specific name. (p 413 e-f)

[2] Section 375 of the PC prescribes the circumstances in which the offence of rape arises. Thus, forms of sexual intercourse falling under such circumstances renders that an offence of rape may be described in the charge by that name only. In the present case, it was therefore unnecessary to identify the specific limb of s 375 of the PC under which the case of the accused falls. Accordingly, the charges preferred against the accused were not defective. (pp 414 e & 415 a-b)

[3] It is a rule of practice that in sexual offences, the evidence must be corroborated. In a case of a conviction without corroboration, the court must be convinced by the evidence of the complainant before proceeding to convict in absence of which the evidence should be rejected and the accused must be acquitted. It is trite that whether corroborated or otherwise, the complainant's evidence must first be found to be credible. (pp 415 f-i & 416 a)

[4] Where the accused raises the defence of consent, evidence of the manner in which the complainant was threatened by the accused was crucial to secure a conviction. Thus, the contradiction in the evidence of Azreen and the complainant was material and significant. The prosecution ought to have taken positive steps to resolve this contradiction so as to salvage the complainant's credibility. (p 416 b-d)

[4a] Where a witness is necessary to enable the prosecution to make out its case, he must be called; merely offering him to the defence would result in the prosecution leaving gaps in its case to the extent that it could not be said to have discharged the burden it bears. As the complainant had made a complaint to Jeffry after the second incident and a police statement made by the latter was available, he should have been called to testify as his testimony would amount to corroborative evidence pursuant to s. 157 of the Evidence Act 1950 in strengthening the complainant's allegation. (p 416 e-f)

[4b] The prosecution's failure to call Jeffry to testify and the non-production of the police report made by the complainant rendered its case not sustainable. (p 416 f)

[5] A witness cannot be held unworthy of credit in one aspect of the case and worthy in another. As the prosecution had not resolved the contradiction in the material part of the complainant's evidence related to the second charge, her credibility was left in suspense. Therefore, her whole evidence must be disregarded. (pp 416 g & 417 a)

[6] The Sessions judge ought to have rejected the complainant's evidence in the circumstances. A wrong assessment of the complainant's credibility warranted this court's interference. (p 417 c)

[Appeal allowed. Conviction and sentence imposed against accused quashed.]

Case(s) referred to:
Aziz Muhamad Din v. PP [1997] 1 CLJ Supp 523 ***(refd)***
Chiu Nang Hong v. PP [1965] 1 MLJ 40 ***(refd)***
Coghlan v. Cumberland [1898] 1 Ch 704 ***(refd)***
DPP v. Kilbourne [1973] 1 All ER 440 ***(refd)***
Goh Ah Yew v. PP [1949] MLJ 150 ***(refd)***
Krishnan & Anor v. PP [1981] 2 MLJ 121 ***(refd)***
PP v. Teoh Choon Teck [1963] MLJ 34 ***(refd)***
PP v. Chia Leong Foo [2000] 4 CLJ 649 ***(refd)***
Pie En Chin v. PP [1983] 1 CLJ 316; [1983] CLJ (Rep) 703 ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 152(2), (3), 153, 154
Evidence Act 1950, s. 114(g)
Penal Code, ss. 375, 376

Other source(s) referred to:
AIR Commentaries on The Code of Criminal Procedure, 7th edn, vol 2, pp 562-563

For the appellant - Edmund Bon Tai Soon; M/s Chooi & Co
For the respondent - Duncan Sikodol, AG's Chambers

Reported by M Maheswaran

JUDGMENT

Augustine Paul J:
Two charges of rape were preferred against the accused in the Sessions Court at Kuala Lumpur. The charges read as follows:

First Charge

> Bahawa kamu, pada 10hb Oktober 1999, jam lebih kurang 5.00 pagi di dalam sebuah bilik di rumah no. 10-2, Jalan 5A/6, Taman Setapak Indah, Setapak, dalam daerah Sentul, dalam Negeri Wilayah Persekutuan Kuala Lumpur, telah merogol Suhailiah Bt Bajoori KP: 790813-01-5760 dan dengan itu kamu telah melakukan kesalahan yang boleh dihukum di bawah Seksyen 376 Kanun Keseksaan.

Second Charge

> Bahawa kamu, pada 10hb Oktober 1999, jam lebih kurang 11.00 pagi di dalam sebuah bilik di rumah no. 10-2, Jalan 5A/6, Taman Setapak Indah, Setapak, dalam daerah Sentul, dalam Negeri Wilayah Persekutuan Kuala Lumpur, telah merogol Suhailiah Bt Bajoori KP: 790813-01-5760 dan dengan itu kamu telah melakukan kesalahan yang boleh dihukum di bawah Seksyen 376 Kanun Keseksaan.

The accused claimed trial to the charges. In support of its case the prosecution called six witnesses. When the accused was called upon to enter his defence on both the charges he elected to give evidence on oath. He did not call any other witness. The learned Sessions Court judge found the accused guilty on both the charges and upon conviction, imposed a sentence of ten years imprisonment and eight strokes of the rotan in respect of the first charge and twelve years imprisonment and ten strokes of the rotan in respect of the second charge. This appeal is by the accused against the convictions and sentences.

Suhailiah Bt Bajoori (PW5), the complainant, finished work on 9 October 1999 at 11pm. She had arranged with one Jeffry bin Saad and the accused to pick her up from her house to go for a drink. She was picked up by the accused, Hairol and Azrene bin Mohamad (PW2). However, instead of being taken for a drink she was taken to the house of the accused. She was told that Jeffry bin Saad would be coming there later. The four of them went into the accused's room in the house. Soon afterwards the accused's brother called Murad joined the group. The accused, Hairol and Murad had some beer. PW5 then said:

> OKT tanya saya, 'kenapa kau cakap macam itu'. Maksudnya di tempat kerja saya ada terlepas cakap, 'hendak jual ke Chow Kit ke'. OKT kemudian kata – 'Kalau aku hendak jual, aku boleh jual engkau sekarang. Aku kenal bapa ayam di Chot Kit'. Air muka OKT juga berubah. Saya rasa dia cakap serious. Saya rasa takut. Saya lemah semangat bila OKT kata begitu. Kemudian saya minta maaf sebab saya terlepas cakap.

She then added:

> Selepas saya minta maaf dan dia masih tekankan soalan yang sama, OKT minta saya bersiap untuk ke Chow Kit sekarang. Saya terus takut kerana Chot Kit adalah sarang pelacuran. Saya takut dia akan betul-betul jual saya di sana. Saya tidak cuba keluar kerana ada 4 lelaki lain dan ada sebatang kayu. Kayu itu betul-betul di belakang OKT. Mungkin kayu itu akan digunakan untuk pukul saya. Kalau saya pengsan, dia boleh bawa saya betul-betul ke Chow Kit.

Very soon afterwards the others left the room and PW5 was left alone in the room with the accused. He forced her to drink beer. She then said:

> Lebih kurang jam 4.00 a.m. hendak masuk 5.00 a.m. dia kata 'kalau engkau tidak mahu aku jual engkau, engkau kena bagi aku main sekali'. 'Main' maksudnya melakukan hubungan seks. Sebagai seorang yang belum kahwin saya takut dan seboleh-bolehnya ingin mempertahankan maruah saya dan keperawanan saya. Bila dia cakap macam itu saya rasa teramat takut kerana saya takut dia betul buat apa yang dia cakap iaitu jual saya ke Chow Kit. Kemudian dia cakap 'kau hendak aku jual ke atau hendak kasi aku main'. Saya cakap 'janganlah buat dua-dua perkara pada saya'. Saya minta tolong pada dia – jangan buat apa-apa pada saya. Lepas itu dia cakap 'kalau aku hendak juga?' Saya cakap 'janganlah buat begitu, kita satu tempat kerja'. OKT cakap dia hendak juga. Dia kata 'kalau awak tidak bagi pun, awak tidak boleh lari - sebab Hairol, Azrene dan Murad ada di luar bilik dan bilik-bilik sebelah pun ada penghuni'. Dia cakap lagi – 'kalau kau jerit, aku panggil dia orang dan kerjakan engkau ramai-ramai'. Saya percaya dia akan buat begitu.

PW5 said that the accused then forced her to take off her clothes and raped her. When she went to the bathroom afterwards she saw PW2, Hairol and Murad outside the room. She then returned to the room. The persons who were outside also came into the room. PW5 said that she wanted to go back home. The accused told her that if she wanted to go back she must have sex with him again. In explaining the circumstances that led to the second occasion when she was raped she said:

> Saya tanya kenapa saya perlu buat sekali lagi baru benarkan saya keluar. Dia kata 'kalau awak tidak beri dia tidak akan benarkan saya keluar pergi mana-mana pun'. Saya memang rasa takut. Oleh kerana saya tidak mahu orang syak yang bukan-bukan terhadap kami jika saya tidak pergi kerja dan OKT juga tidak pergi kerja. Dia terus cakap dia hendak sekali lagi. Dia kata dia seorang sahaja. Azrene dan Murad tidak akan buat benda ini. Mereka cuma tengok sahaja. Masa itu dia tidak ungkit hendak jual saya di Chow Kit. Dia cuma kata kalau hendak balik kena main sekali lagi. Kemudian saya cakap – kalau dia janji hendak lepaskan saya selepas main sekali lagi saya sanggup tetapi saya hendak terus balik lepas buat. Saya bersetuju dengan kehendaknya dengan syarat saya dilepaskan selepas adakan hubungan seks.

> Lepas itu dia suruh saya tanggalkan pakaian saya dan dia buat sekali lagi perbuatan yang sama. Dia juga tanggalkan pakaiannya. Dia menghisap buah dada saya dan memasukkan kemaluannya ke dalam kemaluan saya. Dia cakap sebab dah longgar jadi kemaluannya cepat masuk. Saya rasa hendak mengerang dan rasa sakit. Saya harapkan simpati dengan Murad dan Azrene yang ada dalam bilik – minta mereka halang OKT. Saya pandang Murad dan Azrene tapi mereka cuma pandang kosong dan tidak menolong saya.

PW5 then went to the bathroom and dressed herself up and went downstairs to a restaurant. She telephoned Jeffry bin Saad who came to fetch her. As she said:

> Jeffry datang tengah hari. Bila hujan sudah reda, dia hantar saya balik ke rumah saya di Lembah Keramat. Saya beritahu kepada Jeffry atas apa yang OKT buat pada saya di tempat kerja pada hari yang sama. Jeffry tidak sangka kawannya akan buat begitu pada saya. Jeffry kata tak payah buat report. Saya tidak pasti kenapa dia kata begitu. Saya tidak buat report lepas kejadian itu.

PW5 then took two weeks emergency leave. Upon being queried by her employer Mashitah bt Abdullah @ Tay Joo Tiang (PW4) PW5 explained what had happened to her. PW5 then said:

> Puan Mashitah kata kalau tidak buat report, ada kemungkinan saya mengandung atau akan dapat penyakit. Saya rasa takut. Mashitah juga cakap takkan hendak biarkan OKT bebas selepas apa yang dia buat pada saya. Menurut Puan Mashitah kejadian seperti ini memang kerap berlaku di kelab.
>
> Puan Mashitah bawa saya pergi untuk buat laporan polis pada hari yang sama di Balai Polis Dang Wangi. Buat report pada 21.10.1999 jam 6.00 p.m.

The police report was not tendered in evidence. On 22 October 1999 PW5 was examined by Dr Noor Fidak bt Samsudin (PW3) at the General Hospital, Kuala Lumpur. PW5 was cross-examined vigorously the thrust of which was that she had consented to the sexual acts which she denied. She maintained that at the time of the second incident PW2 and Murad were in the room. She confirmed their presence even when questioned by the court.

PW2 said that when the accused and PW5 (whom he referred to as 'L') were in the room earlier he, Murad and Hairol were outside as the accused did not allow them to go inside. He did not know what happened inside the room. In narrating the circumstances preceding the second incident PW2 said:

> Pada jam 10.00 a.m. lebih, saya nampak OKT memujuk 'L' untuk mengadakan hubungan seks. 'L' tidak hendak. Saya ketika itu tidur-tidur ayam. OKT memujuk 'L' banyak kali. Mula-mula OKT pujuk secara lembut kemudian dengan kekerasan. OKT kata kalau dia tidak mahu adakan hubungan seks dengan dia, dia akan bawa 'L' ke bilik Bangla. Cara dia cakap macam

mengugut. Dia juga kata kalau tak hendak juga, dia hendak bawa 'L' pergi Chow Kit – untuk apa saya tidak pasti. Dia bercakap dengan cara kekerasan. Tidak pasti berapa lama OKT memujuk 'L' untuk adakan hubungan seks.

Selepas itu 'L' bersetuju. Saya dengar 'L' macam bersetuju. Masa 'L' cakap setuju, dia seperti takut-takut. Kemudian 'L' membuka pakaiannya. Dia duduk mencangkung sekejap. Kemudian Malik buka 'L' punya bra. Lepas itu dia suruh 'L' baring. Selepas 'L' baring, OKT jilat kemaluan 'L'. Lepas itu tidak pasti apa OKT buat, kerana saya waktu itu duduk di bangku yang ada dalam gambar.

PW2 then added:

Pada waktu OKT mengadakan hubungan seks dengan 'L', hanya saya seorang dalam bilik. Hairol keluar daripada bilik dan Murad pergi kerja. Murad pergi keluar kerja lebih kurang 10.00 lebih.

In his cross-examination PW2 was asked:

Apa yang awak beritahu di antara perbualan antara OKT dan 'L' tidak tepat?

He replied:

Tidak benar.

He also said that when Murad went off for work Hairol was outside the room.

PW4 confirmed in her evidence that PW5 had told her that she had been raped. She also said:

Dia ada sebut semasa hendak dirogol, dia paksa dan kalau enggan adakan hubungan seks, dia diugut akan dijual di Chow Kit.

PW4 said that she assisted PW5 in making the police report.

PW3 examined PW5 on 22 October 1999 at the request of Inspector Tan Geok Mooi (PW6), the investigating officer. PW3 found PW5 to have an old tear in the hymen meaning that it was more than three days old. She said that the position of the tear indicated that there was full penetration. PW6, in narrating the investigation conducted by her, said in her evidence:

Selain OKT, saya juga tangkap adik OKT bernama Murad bin Saleh. Saya juga rakamkan percakapan Murad di bawah Seksyen 12 KAJ. Juga ambil percakapan saksi Azrene, Hairol dan Jeffry bin Saad.

At the close of its case the prosecution offered to the defence Murad bin Saleh, Jeffry bin Saad, Hairol Azhar bin Marbawi, Inspector Khoo Joi Tien, Corporal Cheah Chian, Hidzir and Jeffry bin Rokimi.

In his defence the accused said that PW5 consented to the sexual intercourse on both the occasions. His cautioned statement (exh. D3) is consistent with the evidence he gave in court.

Learned counsel for the accused, in eloquently arguing the appeal before me in his usual sense of commitment to his cause, advanced several grounds. It is sufficient for me to confine myself to two of the grounds. They are:

(a) the charges are defective

(b) adverse inference ought to have been drawn against the prosecution

(a) That the charges are defective

Learned counsel contended that both the charges are defective as they are not specific in that they do not set out the particular limb of s. 375 of the Penal Code under which the prosecution case proceeded. In support of his argument he referred to *PP v. Teoh Choon Teck* [1963] MLJ 34 where Hepworth J said at p. 35:

> If there be any one principle of criminal law and justice clearer and more obvious than all others, it is that the offence imputed must be positively and precisely stated, so that the accused may certainly know with what he is charged, and be prepared to answer the charge as best he may. (*Lim Beh & Ors v. Opium Farmer* [1842], 3 Ky 10). A charge should be so drawn that the accused should know exactly and with particularity the case which he has to meet and he should not be left guessing as to which of a number of alternatives he is alleged to have offended against. A charge, and especially a charge in a complicated case, should be accompanied by particulars of the acts complained of as constituting the crime charged when the mere mention of the time, place, persons and crime are insufficient to explain by what means the crime was committed. This is particularly necessary in charges of such offences as cheating. The particulars need not be incorporated in the charge. It is sufficient if they are contained in a separate memorandum supplied to the accused and to the Court. Such a course helps the prosecutor by providing a simple list of the main points which he must prove; it helps the accused by letting him know exactly what he is alleged to have done that was wrong; it helps the Court by giving it a proper outline of the case which enables it to appreciate the significance and the bearing of any piece of evidence as it is given. (*Sathiah v. R* [1938] MLJ 30).

In his reply the learned deputy public prosecutor contended that s. 376 of the Penal Code under which the accused was charged does not require the circumstances to be specified. In any event, he said, if in fact it was necessary for the charges to be specific the accused had not been prejudiced by the failure to adhere to the rule.

I must say that the argument advanced by learned counsel is indeed attractive. It is consistent with the general principles in the judgment of Hepworth J that he referred to. It must, however, be observed that the judgment of Hepworth J which is based on the provisions of ss. 152, 153 and 154 of the Criminal Procedure Code must be read with caution. Section 152 of the Criminal Procedure Code reads as follows:

(1) Every charge under this Code shall state the offence with which the accused is charged.

(2) If the law which creates the offence gives it any specific name the offence may be described in the charge by that name only.

(3) If the law which creates the offence does not give it any specific name so much of the definition of the offence must be stated as to give the accused notice of the matter with which he is charged.

(4) The law and section of the law against which the offence is said to have been committed shall be mentioned in the charge.

(5) The fact that the charge is made is equivalent to a statement that every legal condition required by law to constitute the offence charged was fulfilled in the particular case.

(6) If the accused has been previously convicted of any offence, and it is intended to prove that previous conviction for the purpose of increasing the punishment which the Court is competent to award, the fact, date and place of the previous conviction shall be stated in the charge. If the statement is omitted the Court may add it at any time before sentence is passed.

This section deals with the form of a charge. Section 152(2) of the Criminal Procedure Code clearly stipulates that if the law which creates the offence gives it any specific name the offence may be described in the charge by that name only. On the other hand s. 152(3) of the Criminal Procedure Code provides that there is a need to state so much of the definition of the offence as to give the accused notice of the matter with which he is charged if the law which creates the offence does not give it any specific name. In this regard I refer to *Krishnan & Anor v. PP* [1981] 2 MLJ 121 where Salleh Abas FJ (as he then was) said at p. 122:

> One of the rules relating to the framing of charges is that where the law does not give any specific name to the offence with which an accused person is charged, it will be sufficient for the prosecution to state in the charge so much of the definition of the offence as will give notice to the accused of the matter with which he is charged (section 152(111) of the Criminal Procedure Code).

It follows that where an offence is given a specific name it is sufficient to describe the offence in the charge by that name only. This is so even if the specific name given may incorporate several circumstances in which the offence may be committed. In explaining the operation of this rule I consider it pertinent to refer to the *AIR Commentaries on The Code of Criminal Procedure* 7th edn, vol 2 at pp. 562 - 563:

> Where an offence has a name given to it by law such as 'rioting' 'theft', etc, the Court may describe it by its name only. Thus, in a charge under s. 147,

> Penal Code, where the word 'rioting' is included in the charge, the words 'by force or by show of force', need not be included because the suggestion of force is contained in the word 'rioting'. Similarly, it is open to the prosecution to charge abetment generally and then, if the evidence did not establish abetment other than in one particular form, to rely on this particular form for a conviction. The charge will amount to notice to the accused that he will have to meet a case of abetment in one or more of the different ways indicated in Section 107, Penal Code. ... Where it is stated in the charge that the accused had caused 'grievous hurt' the specification of the various clauses in Section 320, Penal Code, is unnecessary because the mention of the name 'grievous hurt' gives notice to the accused that he will have to meet a case in one or more of the different ways mentioned in Section 320, Penal Code. The Court has, however, a discretion to give further details according to the facts and circumstances of each case. Where further details are given, they should be fully and accurately stated and should be such as to give the accused clear notice of the accusation against him. If the particular clause, etc, of the section is specified in the charge, the prosecution is not entitled to rely on a different clause of that section because in that case the accused is not expected to meet a case under any clause other than the one mentioned in the charge.

In light of the provisions of law that I have referred to the argument advanced by learned counsel can only be sustained if the offences with which the accused has been charged have not been given a specific name. It must be observed that the law under which the accused has been charged is only the punishable provision. It is s. 375 of the Penal Code which creates the offence of rape. It reads as follows:

> A man is said to commit 'rape' who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the following descriptions:
>
> (a) against her will;
>
> (b) without her consent;
>
> (c) with her consent, when her consent has been obtained by putting her in fear of death or hurt to herself or any other person, or obtained under a misconception of fact and the man knows or has reason to believe that the consent was given in consequence of such misconception;
>
> (d) with her consent, when the man knows that he is not her husband, and her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married or to whom she would consent;
>
> (e) with her consent, when, at the time of giving such consent, she is unable to understand the nature and consequences of that to which she gives consent;
>
> (f) with or without her consent, when she is under sixteen years of age.

Pursuant to s. 375 of the Penal Code a man who has sexual intercourse with a woman under any of the circumstances enumerated therein is said to commit "rape". Sexual intercourse under any of the prescribed circumstances has thus been given the specific name of "rape". The corollary is that an offence of rape may be described in the charge by that name only. It is therefore not necessary to identify the specific limb of s. 375 of the Penal Code under which the case of the accused falls. In the circumstances the charges preferred against the accused are not defective. When this process of reasoning was explained to learned counsel he conceded with charm and grace. I ruled that this ground cannot be sustained.

(b) That an adverse inference ought to have drawn against the prosecution

In his reliance on this head of submission learned counsel said that with regard to the second charge PW5 had testified that the accused had not threatened her. On the other hand PW2 had said that she was threatened. Furthermore, PW5 had said that at the time of the second incident there were two others in the room while PW2 had said that he was alone. This contradiction, learned counsel said, affects the credibility of PW5. Jeffry bin Saad, to whom PW5 made an immediate complaint, could have corroborated her evidence if he had been called as a witness. He argued that in the circumstances the prosecution ought to have called him as a witness and the failure to do so warrants an adverse inference being drawn against the prosecution pursuant to s. 114(g) of Evidence Act 1950. In his reply the learned Deputy Public Prosecutor said that any evidence that Jeffry bin Saad could have given would have been of no value as he was not present at the time of the incident. He argued that the defence ought to have called Jeffry bin Saad as a witness if it so desired. He concluded his submission by saying that the trial court had made an assessment of the credibility of the witnesses and that the appellate court should be slow to disturb such findings.

This submission relates to the credibility of PW5. It is a rule of practice that in sexual offences the evidence of a complainant must be corroborated. However, as I said in *Aziz bin Muhamad Din v. PP* [1997] 1 CLJ Supp 523:

> Even in such cases a conviction based on uncorroborated evidence is not illegal. But the rule of practice regulates the manner in which uncorroborated evidence is to be treated, that is to say, the judge must warn himself of the dangers of convicting on such evidence.

It is trite law that in either event the evidence of the complainant must first be found to be credible. In *DPP v. Kilbourne* [1973] 1 All ER 440 it was held that corroboration is only required or afforded if the witness requiring corroboration or giving it is otherwise credible. In the case of a conviction without corroboration the court must be convinced by the evidence of the

complaint before proceeding to convict (see *Chiu Nang Hong v. PP* [1965] 1 MLJ 40). It follows that in both instances the critical matter for initial consideration is the credibility of the evidence of the complainant. If it is not so the evidence should be rejected and the accused must be acquitted.

It must be observed that the case for the prosecution proceeded on the basis that PW5 submitted to the desires of the accused in view of the threats held out by him. Evidence of the manner in which PW5 was threatened is therefore of critical importance in order for the charges to be sustained as it is the crux of the case since the defence of the accused is one of consent. The threats held out by the accused on the first occasion is dependent on the evidence of PW5 alone. With regard to the alleged rape on the second occasion PW5 said that the accused did not threaten to sell her at Chow Kit. She also said that PW2 and Murad were in the room at that time. But the evidence of PW2 is different. He said that he was the only person present at that time and that the accused threatened PW5. In view of the importance of the evidence of the threat held out to sustain the charges the contradiction in the evidence of PW5 and PW2 is material and significant. It cannot be dismissed as being immaterial as done by the learned Sessions Court judge. The prosecution ought to have taken positive steps to resolve this contradiction so as to salvage the credibility of PW5. This could have been done. PW5 had made a complaint to Jeffry bin Saad soon after the second incident. He had given a statement to the police and was available. If he had been called to testify on the complaint made to him his evidence would amount to corroborative evidence pursuant to s. 157 of the Evidence Act 1950 to lend support to the testimony of PW5. Unfortunately he was not called as a witness. He was merely offered to the defence. Where a witness is necessary to enable the prosecution to make out its case he must be called; merely offering him to the defence will result in the prosecution leaving gaps in its case with the result that it cannot be said to have discharged the burden it bears (see *PP v. Chia Leong Foo* [2000] 4 CLJ 649). In the circumstances the failure by the prosecution to call Jeffry bin Saad is fatal to its case. To compound matters even the police report made by PW5 was not tendered in evidence. The unresolved contradiction in a material part of the evidence of PW5 in relation to the second charge thus leaves her credibility in suspense. In the circumstances her whole evidence must be disregarded. As Wan Yahya J (as he then was) said in *Pie bin En Chin v. PP* [1983] 1 CLJ 316; [1983] CLJ (Rep) 703:

> It is only when a witness's evidence on material and obvious matters in the case is so irreconcilable, ambivalent or negational that his whole evidence is to be disregarded.

Thus it cannot be argued that as the contradiction relates only to the second charge PW5's evidence in respect of the first charge should remain untainted. A witness cannot be held to be unworthy of credit in one aspect of the case and worthy of credit in another aspect. In this regard I refer to *Goh Ah Yew v. PP* [1949] MLJ 150 where Spenser-Wilkinson J said at p. 153:

> Once the evidence of a witness has been rendered unworthy of credit by reason of his complicity in one offence then his credit has gone for all purposes in that trial. A witness cannot be regarded as a split personality who is worthy of credit at one moment and unworthy of credit at the next.

The credibility of PW5 having not been reinforced by other evidence her testimony ought to have been rejected by the learned Sessions Court judge. A wrong assessment of the credibility of PW5 by the learned Sessions Court judge as I have explained warrants an interference by this court. As Lindley MR said in *Coghlan v. Cumberland* [1898] 1 Ch 704 at p. 705:

> … when the question arises which witness is to be believed rather than another, and that question turns on manner and demeanour, the Court of Appeal always is, and must be guided by the impression made on the judge who saw the witnesses. But there may obviously be other circumstances, quite apart from manner and demeanour, which may shew whether a statement is credible or not; and these circumstances may warrant the Court in differing from the judge, even on a question of fact turning on the credibility of witnesses whom this Court has not seen.

With the rejection of the credibility of PW5 the prosecution case cannot be sustained. At the conclusion of the argument on this ground the learned deputy public prosecutor, in great magnanimity and in keeping in tandem with his role as a representative of the guardian of public interest, conceded that there are many inconsistencies in the case and left the matter to the court to decide. In the upshot I allowed the appeal and quashed the convictions and sentences imposed on the accused.